134-377

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. ~~1380~~. 1117

H. FITZGERALD, SERGEANT OF THE CITY OF MANCHESTER, APPELLANT,

vs.

CHARLES GREEN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

FILED MARCH 26, 1889.

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No. 1530.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, MARCH 28, 1889.

1 In the Circuit Court of the United States for the Eastern District of Virginia.

Ex Parte: CHARLES GREEN on Petition for Writ of *Habeas Corpus.*

Be it remembered that heretofore, to wit, on the 7th day of March, A. D. 1889, came the petitioner, Charles Green, by counsel, and presented to the circuit court of the United States for the eastern district of Virginia his petition for the writ of *habeas corpus;* which petition, together with the affidavit thereto and the order of court thereon, is as follows, to wit:

Petition.

To the honorable judges of the circuit court of the United States for the eastern district of Virginia:

Your petitioner, Chas. Green, respectfully shows that he is a citizen of the United States of America and a resident of the State of Virginia; that on the 6th day of November, 1888, he was arrested on the charge of illegally voting on that day, and was indicted therefor, and has since been convicted of said charge in the hustings court for the city of Manchester, Va., and sentenced by said court to imprisonment for 5 months in said city's jail and fined five dollars, as will fully appear by reference to an official copy
2 of the said indictment, the verdict of the jury, and judgment of the hustings court of the said city of Manchester, which are herewith filed and prayed to be read as a part of this petition.

Your petitioner would state and insist that the said indictment charges your petitioner with illegally voting at an election held for presidential electors and members of Congress, and that the judgment of the said court convicts your petitioner on that ground.

Your petitioner insists that the hustings court of Manchester city was without jurisdiction in the cause, and therefore without authority to enter said judgment.

Your petitioner is now detained unlawfully in the jail of the city of Manchester.

Your petitioner insists that, as the said hustings court of Manchester was without jurisdiction of said cause in which it entered said judgment, under which your petitioner is detained and imprisoned, your petitioner is now so illegally detained and imprisoned without authority.

Wherefore, to be relieved of said unlawful detention and imprisonment, your petitioner prays that a writ of *habeas corpus,* to be directed to H. Fitzgerald, sergeant and jailer of the city of Manchester, Va., may issue in this behalf, so that your petitioner may forthwith be brought before this court to do, submit to, and receive what the law may require.

3 (Signed) CHAS. GREEN,
By Counsel.

EDGAR ALLAN &
J. SAMUEL PARRISH,
Att'ys for Petitioner.

1—1530

STATE OF VIRGINIA, *City of Richmond, Va.:*

This day Chas. Green affirmed before me that the statements contained in the above petition are true.

Given under my hand this 9th day of March, 1889.

J. SAMUEL PARRISH,
N. P. in & for City of Richmond.

Order on Foregoing Petition.

Let the writ herein prayed for be issued and made returnable before the U. S. circuit court, at Richmond, on the 9th day of March, 1889, in the U. S. court-house, in Richmond, Va., at 11 o'clock a. m.

RO. W. HUGHES, *Judge.*

And on the same day, to wit, on the 7th day of March, A. D. 1889, in obedience to the foregoing order, the writ of *habeas corpus* issued from the clerk's office of said circuit court.

Said writ, together with the marshal's return thereon, is as follows, viz.:

4 CIRCUIT COURT OF THE UNITED STATES, *Eastern District of Virginia,* } *ss:*

The President of the United States of America to H. Fitzgerald, sergeant and jailer of the city of Manchester, Virginia, Greeting:

We command you that the body of Chas. Green, detained by you and under your custody, as it is said, by whatsoever name he may be called, together with the day and cause of his being taken and detained, you have before the Hon. Ro. W. Hughes, one of the judges of our circuit court of the United States for the eastern district of Virginia, at the United States court-room, in the city of Richmond, Virginia, at 11 o'clock a. m., to do, submit to, and receive all and singular those things which shall then and there be considered of him in this behalf.

And have you then and there this writ.

Witness the Hon M. W. Fuller, Chief Justice of the Supreme Court of the United States of America, at Richmond, Virginia, this 7th day of March, A. D. 1889, and of our Independence the 113th year.

Seal U. S. Cir. C't, East. Dist. Virginia.

M. F. PLEASANTS, *Clerk.*

5 *Marshal's Return.*

Executed March 8, '89, by delivering to H. Fitzgerald, sergeant and jailer of Manchester, in person, a true copy of this writ.

JNO. H. OVERBEY,
Deputy U. S. M.

And on another day, to wit, on the 9th day of March, 1889, came H. Fitzgerald, sergeant of the city of Manchester, Virginia, and filed in the clerk's office of said circuit court his return to the foregoing writ; which return, together with the exhibit filed therewith, is as follows, to wit:

To the Honorable Robert W. Hughes, judge of the circuit court of the United States for the eastern district of Virginia:

The answer of H. Fitzgerald, sergeant of the city of Manchester, Virginia, and *ex officio* jailer, to a writ of *habeas corpus ad subjiciendum* issuing out of the said court, dated the 7th day of March, 1889, to this respondent directed, requiring him to have and produce the body of one Charles Green, alleged to be in respondent's custody, by whatsoever name called, together with the day and cause of his being taken and detained, before your honorable court, at the city of Richmond, Va., on the 9th day of March, 1889, at 11 o'clock a. m.

6 This respondent, for answer to the said writ and in obedience to its requirements, produces here before your honor the body of the said Charles Green, in his custody, to do and receive what in this behalf shall be adjudged and determined concerning him.

And, for further answer to the said writ, respondent saith: On the 24th day of January, 1889, in the hustings or corporation court of the city of Manchester, a court having jurisdiction to try said offence, the said Charles Green was regularly and in due form of law tried and adjudged guilty upon an indictment against him charging that on the 6th day of November, 1888, at the said city of Manchester and at the 3rd ward election precinct of said city, he, the said Charles Green, well knowing himself not to be a qualified voter in said city at said election, or in any of the voting precincts of the said city, did, unlawfully, knowingly, wilfully, and corruptly and with unlawful intent, vote at the said election for a representative to the Congress of the United States from the 3rd congressional district of Virginia and for electors for President and Vice-President of the United States, and that the jury, regularly sworn upon the issue joined between the Commonwealth of Virginia and the said Charles Green upon his plea of "not guilty" to said indictment, returned the following verdict: "We, the jury, find the prisoner guilty,
7 and assess his punishment at confinement in the city jail for five months and a fine of five dollars," and that on the 5th day of February, 1889, thence next following, the said cause having been regularly continued to this last-mentioned day from the said 24th day of January, the said court of hustings regularly entered judgment against the said Charles Green in conformity to said verdict, and adjudged and ordered that the said Commonwealth of Virginia recover of the said Charles Green the said sum of five dollars, the amount by the jurors in their said verdict assessed, and also that the said Commonwealth recover of the said Charles Green the costs of said prosecution; and also that the said

Charles Green be confined in the jail of the said city of Manchester for the term of five months from the said 5th day of February, 1889, thence next ensuing, the period by the said jury in their said verdict ascertained; but, upon motion of the said Charles Green, the execution of this said judgment was suspended for the term of thirty days from the said 5th day of February next ensuing to allow the said Charles Green to apply to the supreme court of appeals of Virginia for a writ of error and supersedeas to said judgment; and the motion of the said Charles Green in that behalf for bail being overruled, the said Charles Green was thereupon remanded to jail and to the custody of this respondent until he should fully satisfy the judgment aforesaid, including the fine and costs of prosecu-
8 tion, or be otherwise discharged therefrom by due course of law.

And, for further answer to said writ, this respondent begs to subjoin hereto as a part of his answer a duly certified transcript and copy from the records of the said trial and conviction of the said Charles Green, and alleges this and the said judgment as the cause and the sole cause for now holding and detaining the said Charles Green in his custody as aforesaid.

And now, having fully answered, the respondent prays to be hence dismissed with his costs, and that the said Charles Green may be remanded to his custody.

And the respondent will ever pray, &c.

H. FITZGERALD,
Serg't City Manchester.

Exhibit Filed with Foregoing Answer of H. Fitzgerald.

STATE OF VIRGINIA, }
City of Manchester, } *To wit:*

Pleas ... the court-house of the city of Manchester, before the corporation or hustings court of said city, on the 5th day of February, 1889.

Be it remembered that heretofore, to wit, at a corporation or hustings court held for the said city, at the court-house, on the 20th day of November, 1888, Alexander Reams Gent, foreman, with W. D. Anderson, John Freeman, D. D. Beattie, Floyd Bass, and John Baker,
9 were sworn a special grand jury of inquest in and for the body of the city of Manchester, and, having received their charge, were sent out of court, and after some time returned into court and presented Commonwealth against Charles Green, an indictment for a felony, a true bill, No. 2; which indictment is in the words and figures following, to wit:

COMMONWEALTH OF VIRGINIA, }
City of Manchester, } *To wit:*

In the Corporation or Hustings Court of said City.

The grand jurors of the Commonwealth of Virginia, duly summoned, impanelled, and sworn to inquire in and for the body of the

city of Manchester and now attending the said court, upon their oaths present that on the 6th day of November, in the year 1888, an election was held in and at all voting precincts of the said city, at which election were to be chosen and voted for by the qualified electors and voters of the said city a representative to the Congress of the United States from the third congressional district of Virginia, and also electors for President and Vice-President of the United States.

And the jurors aforesaid, upon their oaths aforesaid, do further say and present that Charles Green, then and there well knowing himself not to be a qualified voter in said city at said election or in any of the voting precincts of the said city, did nevertheless then and there, at said election in the third ward voting precinct of said city, unlawfully, knowingly, wilfully, and corruptly and with
10 unlawful intent give in a vote for the officers aforesaid, being the officers then and there to be chosen at the election aforesaid; and the jurors aforesaid, upon their oath aforesaid, do further say and present that the said Charles Green then and there, at the time he gave in the vote aforesaid and before he gave the same, had been, as he well knew, theretofore lawfully convicted and adjudged guilty of the crime of petit larceny, to wit, on the 12th day of November, 1883, at the said city of Manchester, and was therefore disqualified and precluded from exercising the right of suffrage, to the evil example of all others in like case offending and against the peace and dignity of the Commonwealth of Virginia.

Upon the testimony of the following-named witnesses sworn in open court and sent before the grand jury to testify, to wit: C. D. Corbus, Geo. B. Ely, James A. Lipscomb.

H. E. DU VAL, *Clerk.*

And at another day, to wit, at a corporation or hustings court held for said city on the 24th day of January, 1889:

Charles Green, who stands indicted for a misdemeanor (being indictment No. 2), was led to the bar in custody of the sergeant of this city, and thereupon the prisoner demurred generally to the indictment, which demurrer the court overruled, and also pleaded
11 not guilty to said indictment and putteth himself upon the country. Whereupon came a jury, to wit, A. C. Harding, W. J. Williams, Joseph Butler, Thos. H. Holt, Nelson Miller, Chas. Mayo, W. R. Flournoy, W. E. Bailey, W. E. Kahn, Geo. H. Epps, Orin Bass, and Burwell Hicks, who were sworn the truth of and upon the premises to speak, and, having heard the evidence, upon their oaths returned the following verdict, to wit: "We, the jury, find the prisoner guilty, and assess his punishment at confinement in the city jail for five months and a fine of five dollars." And thereupon the prisoner, by counsel, moved the court to set aside said verdict on the ground that the same was contrary to the law and the evidence; which motion is ordered to be docketed and continued until a further day of this term. And thereupon the said Charles Green was remanded to jail.

And now, at this day, to wit, at a corporation or hustings court,

held for the said city, on the 5th day of February, 1889 (being the same day and year first hereinbefore written), the said Charles Green, who stands convicted of misdemeanor (being indictment No. 2), was again led to the bar in the custody of the sergeant of this city; and the court, having heard the argument of counsel on the motion made by the prisoner, by counsel, at a former day of this term, to set aside the verdict of the jury and grant him a new trial, doth overrule the said motion; and thereupon the prisoner, by
12 counsel moved the court in arrest of judgment, which motion the court doth also overrule. Whereupon it is considered by the court that the Commonwealth of Virginia recover against the said Charles Green the sum of five dollars, the amount by the jurors in their verdict assessed; and also that the said Commonwealth of Virginia recover of the said Charles Green the costs of this prosecution; and also that the said Charles Green be confined in the jail of this city for the term of five months, the period by the jurors in their verdict ascertained; but the execution of this judgment is suspended for thirty days to allow the said Charles Green to apply to the supreme court of appeals of Virginia for a writ of error and supersedeas to the same. And thereupon the said prisoner moved the court to grant him bail; which motion the court doth overrule; and thereupon the said Charles Green was remanded to jail.

MEMO.—The prisoner, by counsel, excepted to the ruling of the court, and tendered his several bills of exceptions, which were signed, sealed, enrolled, and ordered to be made a part of the record in this case; which bills of exceptions are in the words and figures following, to wit:

First Bill of Exceptions.

Be it remembered that on the trial of this case the Commonwealth introduced as the first witness to sustain the allegations of the indictment one C. D. CORBUS, who testified as follows:

13 I am the registrar and one of the judges of election for the third ward voting precinct of the city of Manchester, and as such was present at said voting precinct in this city in the discharge of my official duties on the 6th day of November, 1888, the day of the last general election held for presidential electors and representatives to the Congress of the United States from the third congressional district of Virginia. We had at the polls on that day two ballot-boxes; one for the reception of ballots for the officers named above, viz., presidential electors and representative to Congress; the other for the reception of ballots on the question of calling a State constitutional convention. I know the prisoner, Charles Green. He came to the said third ward voting precinct on the said day of election and offered to vote. His vote was challenged by one Mr. George Ely on the ground that he (said Green) had been convicted of petit larceny. The prisoner denied the charge, and insisted on his right to vote. I then explained to him the qualifications of an elector,

and, among other things, told him that if he had been convicted of petit larceny he was not entitled to vote. He still insisting on his right to vote and the challenge not being withdrawn, I thereupon administered to him the oath provided by law in such cases, and received from him his ballot. He voted for presidential electors and representative to Congress, and his ballot was deposited
14 in the box provided and kept for the reception of such ballots.

A book was here handed the witness by the attorney for the Commonwealth, which witness identified as the poll-book of the said third ward voting precinct of this city, kept at said election of November 6th, 1888, and it was thereupon given in evidence to the jury. The name of Charles Green appeared as one of the voters on said list and book, and the witness testified that the said Charles Green there named and set down was the prisoner.

GEORGE B. ELY, the next witness *witness* for the Commonwealth, testified that he was a qualified elector of the third ward voting precinct of the city of Manchester, and was such on the 6th day of November, 1888, the day of the last general election; that on this day he was present at said precinct, in said city, as a challenger; that Charles Green, the prisoner, on that day came up to said precinct and offered to vote; that witness had in his possession a list of convictions for petit larceny taken from the records of the mayor's court of said city, and, observing upon it the name of Charles Green, challenged the vote of the prisoner when it was offered, and assigned as the ground of his challenge the fact that his (prisoner's) name appeared as having been convicted of petit larceny. The prisoner then declared that he was not the man, and said he had never been convicted of petit larceny, and insisted upon his right to vote. He was thereupon sworn by Mr. Corbus, one of the judges of election, and voted.
15 Shortly afterwards and before he left the polls he was arrested by Jas. A. Lipscomb, chief of police.

SIMUEL LOGAN, the next witness for the Commonwealth, testified that he was present as one of the judges of the election of the third ward voting precinct on the 6th day of November, 1888, and saw the prisoner when he voted. Witness heard his (prisoner's) vote challenged on the ground that he (prisoner) had been convicted of petit larceny and heard *and heard* the prisoner deny the charge. Saw his vote received and deposited.

JAMES A. LIPSCOMB, the next witness for the Commonwealth, testified that he was chief of police of city of Manchester and was such on the 6th day of November, 1888; that he made the arrest in this case; that witness came up to the third ward voting precinct on the 6th day of November, 1888, while the election was progressing; that he saw the prisoner, Charles Green, standing there, and, been [being] aware of the fact that he had been convicted of petit larceny, went up to the polls and asked if Charles Green had voted, and being informed that he had, went up to said Green and asked

him the same question, and, prisoner admitting that he had voted, witness thereupon asked said prisoner if he had forgotten the fact that he had been convicted of petit larceny. Prisoner replied, "I'll declare I had forgotten that." Witness then took said Green
16 into custody. Witness further testified that in November, 1883, he had acted as clerk of the mayor's or justice's court of the city of Manchester. Thereupon the attorney for the Commonwealth handed to the witness the following paper:

CITY OF MANCHESTER, *To wit:*

To all or any one of the police officers of the city of Manchester:

Whereas R. P. Smith has this day made complaint and information on oath before me, Jno. E. Taylor, mayor of said city, that on the 10th day of November, 1883, at said city, Charles Green did unlawfully take, steal, and carry away from C. T. Davis & Co. one lot of wood to the value of 25c., the property of said Davis & Co., against the form of a statute made and provided for in such cases: These are, therefore, in the name of the Commonwealth of Virginia, to command you forthwith to apprehend and bring before me or some other justice of the peace of said city the body of the said Charles Green, to answer the said complaint and to be further dealt with according to law; and, moreover, upon the arrest of the said Charles Green by virtue of this warrant I command you, in the name of the Commonwealth of Virginia, to summon C. T. Davis to appear at the mayor's court as witness, to testify in behalf of the Commonwealth against the said Charles Green, on the 12th day of November—that is to say, on the next day following the day of arrest—and have then there this warrant, with your return thereon.

17 Given under my hand and seal this 10th day of November, 1883.

JNO. E. TAYLOR, *Mayor.* [SEAL.]

Endorsement on back of warrant:

COMMONWEALTH *vs.* CHARLES GREEN. } Warrant.

Executed by arresting the within-named Charles Green this 12th day of November, 1883, and by summoning the within-named witnesses.

R. P. SMITH,
Police No. 2.

Police court, 12th day of November, 1883.

CITY OF MANCHESTER, *To wit:*

The accused found guilty and ordered to jail for ten days.

JNO. E. TAYLOR, *Mayor.* [SEAL.]

And asked the witness to take it and examine it; whereupon the prisoner, by his counsel, objected to the introduction of said paper in evidence and to all questions asked the witness in reference to it; in answer to which objection the attorney for the Commonwealth stated he merely handed the paper to the witness for purposes of identification and did not propose to offer it in evidence before the jury unless and until it was fully identified and its genuineness established. The court thereupon, without at that time passing upon the question of the admissibility of the paper in evidence, overruled the objection of the prisoner's counsel to permitting the witness to answer any question in reference thereto; and the witness
18 thereupon, in reply to questions propounded by the attorney for the Commonwealth (to each of which questions as asked the prisoner by his counsel objected), testified that he recognized and identified the paper, and that the body of it was in his own handwriting, and that the signatures "Jno. E. Taylor, mayor," appended to said warrant and to the judgment endorsed upon the back thereof, were both genuine and in the handwriting of John E. Taylor, who, at the time mentioned in said warrant and on the 12th day of November, 1883, was mayor of the city of Manchester; that witness was present in said mayor's or justice's court when the said warrant was tried and the said judgment rendered, and that the Charles Green therein named was the prisoner at the bar and none other; thereupon the attorney for the Commonwealth offered the said paper in evidence to the jury, but to the admission of the said paper in evidence before the jury and for all other purposes whatever, as well as to all the testimony of the said witness in reference to the identity and genuineness thereof, the prisoner, by his counsel, objected and moved the court to exclude the same; but the court overruled the objection of the prisoner and suffered the said paper to go to the jury in evidence, stating to the counsel for the prisoner as it did so (the jury being present at the time in the court-room) that it would permit the said paper to go to the jury as evidence of a conviction of petit larceny, as well as the testimony aforesaid in reference to
19 the identity and genuineness thereof; to which ruling of the court in admitting the said evidence the prisoner, by his counsel, then and there excepted and tendered this his bill of exceptions and prayed the court to sign, seal, and make the same a part of the record of his trial, which is accordingly done; and, as pertinent, the court doth further certify that another witness, H. Fitzgerald, was introduced for the Commonwealth, who testified that he was sergeant of the city of Manchester in November, 1883; that he knew the prisoner, Charles Green; that he received him into his custody in November, 1883, under and by virtue of the conviction set forth in the warrant mentioned and set forth above, and that said prisoner served out his sentence of ten days' confinement in said judgment imposed, and was thereafter duly discharged by him from custody.

And the court doth certify that the evidence embodied in this bill of exceptions was all the evidence produced on said trial.

JOHN H. INGRAM. [SEAL.]

Second Bill of Exceptions.

Be it remembered that on the trial of this case, after all the evidence had been introduced before the jury, as set out in the 1st bill of exception- of the accused, the case had been argued by counsel, and the jury had returned their verdict, in the following words and figures, to wit:

"We, the jury, find the prisoner guilty, and assess his punishment at confinement in the city jail for five months and a fine of five dollars."

"A. C. HARDING, *Foreman.*"

The accused, by counsel, moved the court to set aside the verdict as contrary to the law and evidence and grant him a new trial; which motion the court overruled; to which action and ruling of the court the accused, by counsel, excepts and prays that this his bill of exceptions may be signed, sealed, and made part of the record, which is accordingly done; and the court certifies that, all the evidence introduced before the jury having been set out in 1st bill of exceptions, the same is referred to and made a part of this bill of exceptions.

JOHN H. INGRAM. [SEAL.]

Third Bill of Exceptions.

Be it remembered that on the trial of the case, after the court had overruled the motion of the accused to set aside the verdict of jury and grant him a new trial, as is set forth in the 2nd bill of exceptions and is referred to and made a part of this bill of exceptions, the accused, by counsel, moved the court in arrest of judgment for errors appearing on the face of the record; but the court overruled said motion; to which action and ruling of the court the accused, by counsel, excepts and prays that this his bill of exceptions may be signed, sealed, and enrolled by the court, which is accordingly done.

JOHN H. INGRAM. [SEAL.]

Fourth Bill of Exceptions.

21 Be it remembered that on the trial of this case, after all the evidence had been introduced before the jury, as set out in the first bill of exceptions of the accused, the court had overruled the motion of the accused to set aside the verdict of the jury and grant him a new trial, as set out in the 2nd bill of exceptions taken by the accused, and had also overruled the motion of the accused in arrest of judgment, as set out in the 3rd bill of exceptions of the accused, and was about to enter up judgment against the accused, the accused moved the court to grant him bail; which motion the court also overruled; to which action of the court the accused, by counsel, excepts and prays that his bill of exceptions may be signed, sealed, and made part of the record, which is accordingly done;

and the court certifies that all the evidence introduced before the jury and exceptions taken by the accused to the introduction thereof and all the rulings of the court on the trial of this case are set out in the 1st, 2nd, and 3rd bills of exceptions of the accused and are referred to and made a part of this bill of exceptions.

JOHN H. INGRAM. [SEAL.]

A transcript from the record.
Teste: H. E. DU VAL, *Clerk.*

And now, at this day, to wit, at a circuit court of the United States for the eastern district of Virginia, held at Richmond, in said
22 district, on the 9th day of March, A. D. 1889, the following order was entered in the above-entitled cause, to wit:

In the Circuit Court of the United States for the Eastern District of Virginia.

Ex Parte: CHARLES GREEN.

Upon reading the petition of the petitioner, Charles Green, and the return of H. Fitzgerald, sergeant of the city of Manchester, Virginia, to the writ of *habeas corpus* awarded herein, and the transcript of the record of the proceedings in the hustings or corporation court of Manchester, filed by the said sergeant as a part of his return, the court, upon consideration thereof, and of the arguments of counsel for the petitioner, and of the attorney general of Virginia, and the attorney for the Commonwealth for the said city of Manchester, in behalf of the said sergeant, is of the opinion, and doth so declare and order, that the United States courts for this district have sole and exclusive jurisdiction to hear and determine the matters and things alleged in the bill of indictment found in the said hustings court of Manchester, upon the ground that the acts of Congress in such case made and provided (section- 5511 and 5514, Rev. Stat. U. S.) have defined the offense charged in the said indictment and prescribed the penalty therefor, and that the United States courts have
23 sole and exclusive jurisdiction thereof, and that the said hustings or corporation court of Manchester had no jurisdiction of the matters and things charged in the said indictment against the said Charles Green.

And the court doth therefore adjudge and order that the said Charles Green is detained in custody by the said H. Fitzgerald, sergeant of the city of Manchester, in violation of the laws of the United States, and doth order that the said Charles Green be discharged from the custody aforesaid.

Whereupon the said H. Fitzgerald, sergeant as aforesaid, in open court prayed an appeal to the Supreme Court of the United States from the judgment of the court discharging the said Charles Green from his custody, which appeal the court doth allow upon the execution of bond, payable to the United States of America, in the penalty of two hundred dollars ($200), conditioned for the payment of all costs that may become due to the officers of the Supreme

Court of the United States or be occasioned by this appeal; and the said H. Fitzgerald having tendered a bond, executed and conditioned according to law, with R. A. Ayers as surety, the same is approved and accepted. It is therefore ordered, pursuant to section 765 of the Revised Statutes and rule 34 of the Supreme Court of the United States, that the said Charles Green be enlarged upon recognizance, with surety in the penalty of two hundred and fifty ($250) dollars, for his appearance to answer the judgment of the Su-
24 preme Court of the United States upon this appeal or the judgment of this court made under the mandate of the Supreme Court of the United States in the matter of this appeal.

RO. W. HUGHES, *Judge.*

Whereupon the petitioner, the said Charles Green, entered into a recognizance in the sum of two hundred and fifty ($250.00) dollars, with Simeon Logan as surety, which recognizance was approved by the court, conditioned for his appearance to answer the judgment of the Supreme Court of the United States upon this appeal or the judgment of this court upon the mandate of the Supreme Court in the matter of this appeal.

The appeal bond required by the foregoing order is in the words and figures following, to wit:

Appeal Bond.

Circuit Court of the United States of America, Eastern District of Virginia.

Ex Parte: CHARLES GREEN.

Know all men by these presents that we, H. Fitzgerald and R. A. Ayers, are held and firmly bound unto the United States of
25 America in the sum of two hundred dollars, to be paid to the United States of America; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 9th day of March, A. D. 1889.

Whereas the above-bound H. Fitzgerald, sergeant of the city of Manchester, hath prosecuted an appeal to the Supreme Court of the United States to reverse the judgment of the circuit court of the United States for the eastern district of Virginia, discharging Charles Green from the custody of the said H. Fitzgerald, sergeant, rendered upon the hearing of a writ of *habeas corpus:* Now, therefore, the condition of this obligation is such that if the above-bound H. Fitzgerald shall prosecute his said appeal to effect and answer all damages and costs if he shall fail to make good his appeal, then this obligation shall be void; otherwise to remain in full force and virtue.

H. FITZGERALD. [SEAL.]
R. A. AYERS. [SEAL.]

Approved:
RO. W. HUGHES, *Judge.*

26 UNITED STATES OF AMERICA, *To wit:*

The President of the United States to the judges of the circuit court of the United States for the eastern district of Virginia, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said court, before you, between H. Fitzgerald, sergeant of the city of Manchester, Virginia, and Charles Green, a manifest error hath happened, to the great damage of the said H. Fitzgerald, as by complaint appears, he [we], being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, in the District of Columbia, together with this writ, so that you may have the same at Washington, in the said District, on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 9th day of March, in the year of our Lord one thousand eight hundred and eighty-nine.

[Seal United States Circuit Court, Eastern District of Virginia.]

M. F. PLEASANTS,
Clerk of the Circuit Court of the United States for the Eastern District of Virginia.

27 UNITED STATES OF AMERICA, *Eastern District of Virginia,* } *ss:*

Ex Parte: CHARLES GREEN on Petition for Writ of *Habeas Corpus.*

I, M. F. Pleasants, clerk of the circuit court of the United States for the eastern district of Virginia, hereby certify that the foregoing is a true and complete transcript of the record and proceedings in the above-entitled cause, as the same remains on file in my office.

Seal United States Circuit Court, Eastern District of Virginia.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Richmond, in said district, this 14th day of March, A. D. 1889.

M. F. PLEASANTS,
Clerk U. S. Circuit Court, Eastern District of Virginia.

Endorsed on cover: E. Virginia C. C. U. S. No. 1530. H. Fitzgerald, sergeant of the city of Manchester, appellant, *vs.* Charles Green. Filed March 26, 1889.

IN THE

Supreme Court of the United States.

No. 1117.

H. FITZGERALD, Sergeant of the city of Manchester, appellant,

vs.

CHARLES GREEN.

No. 1118.

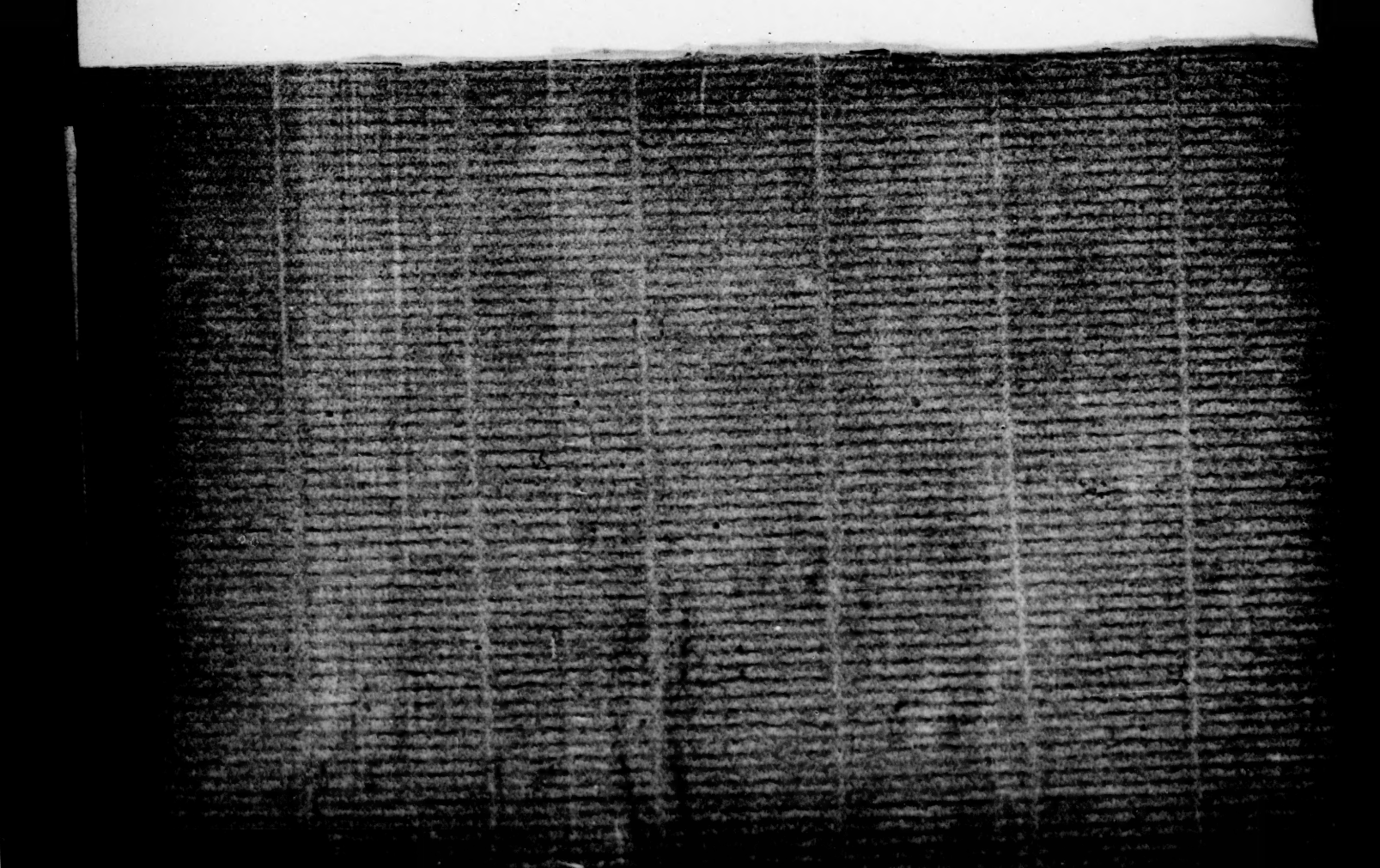
W. L. THOMAS, Police Sergeant of the city of Richmond, appellant,

vs.

~~CHARLES GREEN~~ Wilson Loney.

Appeals from the Circuit court of the United States for the Eastern District of Virginia.

BRIEF OF R. A. AYERS, ATTORNEY-GENERAL OF VIRGINIA, and J. R. Tucker FOR APPELLANTS.



IN THE

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STATEMENT.

These cases, whilst differing in some respects, really involve but one question. In the first recited case, Charles Green was indicted in the hustings court of the city of Manchester on the 5th day of February, 1889, for illegally voting at an election held for electors for President and Vice-President, and for a Representative to the Congress of the United States from the third congressional district of Virginia, on the 6th day of November, 1888, being disqualified by a previous conviction for petit larceny. At the January term of said

hustings court, Green was tried, convicted and sentenced to five months imprisonment in jail and to pay a fine of five dollars. The said Green being confined in jail pursuant to the said judgment, sued out a writ of *habeas corpus* from the circuit court of the United States for the eastern district of Virginia.

Upon the hearing of the writ the court held that "the United States courts for this district have sole and exclusive jurisdiction to hear and determine the matters and things alleged in the bill of indictment found in said hustings court of Manchester, upon the ground that the acts of congress in such case made and provided (sections 5511 and 5514, Revised Statutes of the United States), have defined the offense charged in said indictment, and prescribed the penalty therefor, and that the said hustings court of Manchester had no jurisdiction of the matters and things charged in said indictment against the said Charles Green," and discharged him from the custody of the appellant. From this judgment an appeal to this court was prayed for and granted.

In the second recited case, Wilson Loney was arrested by the appellant, police sergeant of the city of Richmond, upon a warrant issued by a justice of the peace of the city of Richmond, upon a charge of wilful perjury, committed in his testimony given before a notary public of the said city, in the matter of contest between George D. Wise and Edmund Waddill for a seat in the fifty-first congress. Whilst so under arrest and in the custody of said police sergeant, the said Loney sued out a writ of *habeas corpus* from the circuit court of the United States for the eastern district of Virginia, and upon the hearing the court held that the courts of the United States have exclusive cognizance of the offense and discharged him from the custody of the sergeant, from which judgment an appeal was granted here.

The question is sharp and distinct, and involves a proper construction of sections 711 and 5328 of the Revised Statutes of the United States.

The learned circuit judge assumes that the witness Loney committed no offence against the laws of Virginia, because the oath was administered in a contest for a seat in the House of Representatives of the United States, authorized by congress.

The statute of Virginia under which Loney was arrested is as follows:

"If any person, to whom an oath is lawfully administered on

any occasion, wilfully swear falsely on such occasion touching any material matter or thing, or if a person falsely make oath that any other person is twenty-one years of age, in order to obtain a marriage license for such other person, he shall be deemed guilty of perjury." [Code of Virginia, 1887, section 3741.]

This statute is very broad and covers every conceivable case. The notary public, before whom the oath was taken, did not derive his authority to administer the oath under any act of congress, and he was in no sense a federal officer. His authority to administer the oath and to take and certify depositions, was conferred by State authority. He holds his commission at the hands of the executive of the State of Virginia, and is alone amenable to the laws of Virginia for the manner in which he discharges his duties.

Section 923 of the Code of Virginia authorizes the governor to appoint notaries within the State of Virginia. Section 173 of the Code of Virginia authorizes notaries to administer any oath which is not of such a nature that it must be made in court. Section 3352 of the Code of Virginia authorizes notaries to compel the attendance of witnesses. Section 3356 of the Code of Virginia authorizes any person before whom a witness is to be examined, to administer an oath to such witnesses. Section 110 of the Revised Statutes of the United States authorizes depositions in contested election cases to be taken before a notary public it is true, but the act does not confer the authority upon the officer to administer the oath. The depositions are to be taken before a notary, because he is an official authorized to administer oaths. The United States statutes does not attempt to authorize him to administer oaths, but he is selected because he is an officer so authorized. Section 113 Revised Statutes among other things authorizes the contestants, by consent, to take depositions before any officer or officers authorized to take depositions in common law or civil actions or in chancery by either the laws of the United States or of the State in which the same may be taken, and to waive proof of the official character of such officer or officers.

In no sense, therefore, can it be said that the laws of the United States authorizes the oath to be administered by the State officer; on the contrary, care is taken to have the deposition taken before an officer who *has been* authorized to administer an oath. But granting, for the sake of argument, that section 5392 of the Revised Statutes of the United States includes cases where a false oath is

taken before a State officer in a contest for a seat in the House of Representatives of Congress, does this prohibit the State from making the same act an offense under her laws? A false oath is taken before her officer in a proceeding in which he was authorized by her laws to administer the oath. The fact that that act is made a crime under an act of congress, and the same act is criminal under a State statute should not prevent the State from executing her law. It would be very different if the State were to attempt to punish for an offense which was only made so by an act of congress. In that case it is very clear that the jurisdiction would be exclusive, and it is respectfully submitted that the second section of the Judiciary Act of August 13, 1888, was only intended to apply to such cases.

The case of Fox *vs.* Ohio, (5 Howard, 610), is the first case in which this principle seems to have been considered. There the State had punished a man for passing counterfeit money, and after the conviction had been affirmed by the supreme court of Ohio, the case was brought here on writ of error. It was held in an opinion delivered by Mr. Justice Daniel that the conviction under the State statute was proper, and it was affirmed. In this case the court said: "It has been objected on behalf of the plaintiff in error, that if the States could inflict penalties for the offense of passing base coin, and the federal government should denounce a penalty against the same act, an individual under these separate jurisdictions might be liable to be twice punished for the one and the same crime, and that this would be in violation of the fifth article of the amendments to the constitution, declaring that no person shall be subject for the same offense to be twice put in jeopardy of life or limb. Conceding for the present that congress should undertake, and could rightfully undertake, to punish a cheat perpetrated between citizens of a State because an instrument in affecting that cheat was a counterfeited coin of the United States, the force of the objection sought to be deduced from the position assumed is not perceived; for the position is itself without real foundation. The prohibition alluded to as contained in the amendments to the constitution, as well as other with which it is associated in those articles, were not designed as limits upon the State governments in reference to their own citizens. They are exclusively restrictions upon federal power, intended to prevent interference with the rights of the States, and of their citizens.

"Such has been the interpretation given to those amendments by this court in the case of Barron *vs.* The Mayor and City Council of

Baltimore, (7 Peters, 243); and such, indeed, is the only rational and intelligible interpretation which those amendments can bear, since it is neither probable nor credible that the States should have anxiously insisted to ingraft upon the federal constitution restrictions upon their own authority—restrictions which some of the States regarded as the *sine que non* of its adoption by them. It is almost certain that in the benignant spirit in which the institutions both of the State and federal systems are administered, an offender who should have suffered the penalties denounced by the one would not be subjected a second time to punishment by the other for acts essentially the same, unless, indeed, this might occur in instances of peculiar enormity, or where the public safety demanded extraordinary rigor. But were a contrary course of policy and action, either probable or usual, this would by no means justify the conclusion that offenses falling within the competency of different authorities to restrain or punish them would not properly be subjected to the consequences which those authorities might ordain and affix to their perpetration. The particular offense described in the statute of Ohio, and charged in the indictment against the plaintiff in error, is deemed by this court to be clearly within the rightful power and jurisdiction of the State."

In the case of United States *vs.* Marigold, 9th Howard, 560, the court reviewing the case of Fox *vs.* Ohio, said: "With the view of avoiding conflict between the State and federal jurisdictions, this court in the case of Fox *vs.* The State of Ohio have taken care to point out, that the same act might, as to its character and tendencies, and the consequences it involved, constitute and offense against both the State and federal governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each. We think this distinction sound, as we hold to be the entire doctrines laid down in the case above mentioned, and regard them as being in no wise in conflict with the conclusions adopted in the present case."

In the case of Moore *vs.* Illinois, (14 Howard, 13) the prisoner had been convicted of harboring and secreting a negro slave under the State statute, and the case was brought to this court by a writ of error upon the contention that the State statute was void, in that it undertook to prescribe a punishment for an offense which, under the constitution and acts of congress was exclusively cognizable in the courts of the United States. The court in its opinion said: "It has

been urged that this act is void, as it subjects the delinquent to a double punishment for a single offense. But we think that neither the fact assumed in this proposition nor the inference from it, will be found to be correct. The offenses for which the fourth section of the act of 12th of February, 1793, subjects the delinquent to a fine of five hundred dollars, are different in many respects from those defined by the statute of Illinois. The act of congress contemplates recapture and reclamation, and punishes those who interfere with the master in the exercise of this right—first by obstructing or hindering the claimant in his endeavors to seize and arrest the fugitive: second, by rescuing the fugitive when arrested; and third, by harboring or concealing him after notice.

"But the act of Illinois, having for its object the prevention of the immigration of such persons, punishes the harboring or secreting negro slaves, whether domestic or foreign, and without regard to the master's desire either to reclaim or abandon them. The fine imposed is not given to the master, as the party injured, but to the State, as a penalty for disobedience to its laws. And if the fine inflicted by the act of congress had been made recoverable by indictment, the offense, as stated in any one of the counts of the bill before us, would not have supported such an indictment. Even the last count which charges the plaintiff in error with "unlawfully preventing C. D., the lawful owner, from retaking the negro slave," as it does not allege notice, does not describe an offense punishable by the act of congress.

"But admitting that the plaintiff in error may be liable to an action under the act of congress, for the same acts of harboring and preventing the owner from retaking his slaves, it does not follow that he would be twice punished for the same offense. An offense, in its legal signification, means the transgression of the law. A man may be compelled to make reparation in damages to the injured party, and be liable also to punishment for a breach of the public peace, in consequence of the same act; and may be said, in common parlance, to be twice punished for the same offense. Every citizen of the United States is also a citizen of a State or Territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both. Thus, an assault upon the marshal of the United States, and hindering him in the execution of legal process, is a high offence against the

United States, for which the perpetrator is liable to punishment; and the same act may be also a gross breach of the peace of the State, a riot, assault or murder, and subject the same person to a punishment, under the State laws, for a misdemeanor or felony. That either or both may (if they see fit,) punish an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offense; but only that by one act he has committed two offenses, for each of which he is justly punishable. He could not plead the punishment by one in bar to a conviction by the other; consequently, this court has decided, in the case of Fox *vs.* The State of Ohio, 5 How., 432, that a State may punish the offense of uttering or passing false coin, as a cheat or fraud, practiced on its citizens; and in the case of the United States *vs.* Marigold, 9 How., 560, that Congress, in the proper exercise of its authority, may punish the same act as an offense against the United States."

In the case of Coleman *vs.* Tennessee, 7th Otto. 509, the court in reversing the judgment of the supreme court of Tennessee, affirming a judgment of the lower court convicting the prisoner of murder in the first degree, against his plea that he had been tried by a military court martial for the same offense and convicted, which conviction had never been reversed, said: "In thus holding, we do not call in question the correctness of the general doctrine ascerted by the supreme court of Tennessee; that the same act may, in some instances, be an offense against two governments, and that the transgressor may be held liable to punishment by both when the punishment is of such a character that it can be twice inflicted, or by either of the two governments if the punishment, from its nature, can be only once suffered. It may well be that the satisfaction which the transgressor makes for the violated law of the United States is no atonement for the violated law of Tennessee. But here there is no case presented for the application of the doctrine."

"Offenses which are directed against the sovereignty of a State, or which directly affect the State or its population, are punishable in such State, notwithstanding the fact that such offenses are also directed against the sovereignty of the federal government, unless the constitution gives the federal government exclusive jurisdiction over the offense; and even where the federal courts have exclusive jurisdiction of one aspect of an offense, this does not prevent a State court from prosecuting another aspect of the same offense." Wharton's Crim. Law, 9th edition, section 265.

In the case of State *vs.* Whitmore, (50 N. H., 245), a conviction for perjury in false swearing to an affidavit necessary to take out naturalization papers under the laws of congress, was sustained. The court said: "It is clear that this court has no jurisdiction of an indictment for perjury founded on the statute of the United States. "Regarded as an offense against the United States, the courts of the general government have exclusive jurisdiction." "This indictment is not attempted to be supported on the statute of the United States."

The only question is, whether the false swearing was an offense against the State of New Hampshire, punishable under the statute of the State. So far as we know, there are but two decisions directly in point, and they are opposed to each other. Rump *vs.* Com., 30 Pa., State 475, affirms, and People *vs.* Sweetman, 3 Parker's Crim. Report, N. Y., 358, denies the jurisdiction of the State to punish false swearing in naturalization proceedings pending in the State courts. The question is not free from difficulty; but, after some doubt, we have concluded that the offense is punishable under the State law, although it may also be punishable under the United States law. This case differs widely from State *vs.* Pike, 15 N. H., 83, where it was held that the State courts have no jurisdiction over perjury committed before a United State's commissioner in an examination under the United States bankrupt act. In that case, Parker, C. J., said, pages 86, 87: "The commissioner in bankruptcy not only derived no authority from this State, but they cannot be regarded as having exercised their offices by any permission, tacit or otherwise, from it. They derive their authority from a paramount law; and this State could not object to the exercise by them of the duties of their office within its limits, if it had the disposition so to do. The offense, if committed as alleged, it is clearly a crime under the laws of the United States." In the present case the oath was taken to be used in a proceeding in a State court, whose officers were appointed solely by State authority. The proceeding, in one sense, under the laws of the United States; but it was carried on in the State court only by the sufferance of the State. The State is under no obligation to furnish tribunals to aid in the administration of the naturalization laws of congress, and may prohibit its courts from entertaining jurisdiction of applications for naturalization; Stephens, Petitioner, 4 Gray, 559; Beavins' Petition, 33 N. H., 89. False swearing in a State court, if allowed to go unpunished, has a tendency to impair the general usefulness of the tribunal and

the dignity of the State. If it is to be optional with the prosecuting officers of the general government whether perjury in the state court is to be punished, we have the extraordinary spectacle of a State unable to punish an offense committed in its own courts. It would certainly seem almost as proper that the State courts should have power to punish a witness who has testified falsely before them in a naturalization case, as they should have the power to punish contempt of court committed during the pendency of such a case." (See also 116 Mass., page 1.)

Charles Green was indicted for a violation of the election laws of the State of Virginia, in illegally voting at an election held both for a Representative in Congress and for electors for President and Vice-President. In any view of the case, the State courts had jurisdiction to punish for this offense, as the laws of congress make no provision for the punishment of illegal voting at an election held for electors.

The reasoning of the court in the case of In re Coy, 127, U. S., 731, should be conclusive of that question. In that case the offense charged was conspiracy to induce the officers of an election held for a Representative in Congress, and for various State officers, to violate their duty. The jurisdiction of the federal court was sustained because, notwithstanding the fac that various State officers were voted for, the election of a Representative in Congress brought the conspiracy within the provisions of section 5511 Revised Statutes. Here the offense charged embraces the illegal voting for electors for President and Vice-President, which is to that extent an offense exclusively cognizable in the State courts, and comes within the definition frequently referred to, that where the offense charged is not the same, although the evidence to sustain it is the same, the jurisdiction is not ousted. The State court clearly had jurisdiction to punish for the illegal vote cast for electors for President and Vice-President, and the description of the election as being for a Representative in Congress as well as for such electors, did not affect the jurisdiction, even if it be conceded that the jurisdiction to punish for illegal voting for a Representative in Congress is exclusive in the federal court. In numerous instances the same act is an offense both under the Crimes Act of congress and under State statutes. Retailing ardent spirits without a license is an offense against the revenue laws of the United States, and the same act is an offense under State laws. The same applies to wholesale

dealers both in liquors and tobacco, and it is every day's practice to convict the offender, although he may have previously been prosecuted and convicted for the same act by another jurisdiction. The reason and better practice would be to leave it to the legislative authority, federal and State, to decide whether an act should be made punishable by both State and federal laws, and where it is made so punishable and the jurisdiction of either has attached upon the person of the offender, not to interfere until the prosecution has been ended. This will give effect to section 5328 of the Revised Statutes and so construe the Crimes Act as that the whole may stand without conflict.

The experience of half a century has demonstrated that the checks and balances of our dual system are valuable safe-guards to our government, and this court has wisely construed the constitution and laws of congress so that the States have been permitted to retain and exercise every sovereign right not incompatible with the discharge of the functions granted the general government.—U. S. *vs.* Bailey, 9 Peters, 238; Prigg *vs.* Commonwealth, 16 Peters, 630; Commonwealth, *vs.* Guller, 8 Met., Hendrick *vs.* Commonwealth, 5 Leigh; Jett *vs.* Commonwealth, 18 Gratt.; Whart. Com. on Am. Law, Sec. 524; Commonwealth *vs.* Luberg, 94 Penn. St., 85; Whart. Crim. Law, 9th Ed., pp. 288-289, and note.

R. A. AYERS,
Attorney-General of Virginia.

J. R. Tucker

IN THE

Supreme Court of the United States.

H. FITZGERALD, Sergeant of the city of Manchester,
vs.
CHARLES GREEN. } No. 1530.

To the honorable Chief Justice and Associate Justices of the Supreme court of the United States:

The appellant in the above styled cause moves the court to advance the same, and hear it out of its order on the docket, for the following reasons:

The case is of great importance in the administration of the criminal laws of the commonwealth of Virginia.

The appellee was indicted for a violation of the election laws, by illegally voting at the election held in November, 1888, for members of the House of Representatives, and electors for President and Vice-President. He was tried and convicted of the offence, and sentenced to be confined in jail. Whilst so held for punishment a writ of *habeas corpus* was sued out from the circuit court of the United States for the Eastern District of Virginia, and upon the hearing the appellee was discharged, the court holding that the fact that a member of the House of Representatives of the United States was voted for at the election, gave the Federal court exclusive jurisdiction, and that the conviction was illegal.

There are a number of cases, the prosecution of which depend upon the principles involved in this appeal, and it is of the utmost importance to the State that the questions involved shall be speedily adjudicated oy this court.

The State of Virginia, therefore, through her representative, prays the court to advance the appeal, and hear it out of its order upon the docket.

R. A. AYERS,
Attorney-General of the State of Virginia, for Appellant.